

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of) PP Docket No. 93-253
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

APR - 3 1995

TO: Commercial Wireless Division
Wireless Telecommunications Bureau ^{1/}

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF PRESS BROADCASTING COMPANY, INC.

1. Pursuant to the Public Notice, DA 95-651, released March 29, 1995 in the above-captioned matter, Press Broadcasting Company, Inc. ("Press") hereby submits its Comments with respect to the waiver request filed on March 28, 1995 by Telephone Electronics Corporation ("TEC"). As set forth below, Press has serious reservations about the manner in which the Commission appears to be approaching this situation. Nevertheless, Press has no objection to grant of TEC's request as long as an appropriate equivalent opportunity is provided to all others who may wish to seek similar waivers.

2. As a preliminary matter, Press questions the procedural approach being taken in this proceeding. As Press understands

^{1/} Pursuant to the Public Notice, DA 95-651, to which these Comments are directed, these Comments are addressed to the Commercial Wireless Division of the Commission's Wireless Telecommunications Bureau. Additionally, as set forth in the Certificate of Service attached hereto, a copy of these Comments is being served on counsel for Telephone Electronics Corporation. Since the public notice appears to have limited the scope of comments to matters relating to the particular waiver request at issue, copies of these comments are not being served on any other parties to the broader rulemaking proceeding reflected in the caption hereof.

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it, the Commission adopted eligibility criteria for participants in the "entrepreneurs' block auction", and TEC challenged those criteria in the courts, thus creating the possibility of a judicial finding that, inter alia, those criteria represent unconstitutional reverse discrimination. In granting TEC's motion for stay of the new criteria pending the outcome of the appeal, the U.S. Court of Appeals for the District of Columbia Circuit signalled to the parties that it believed it was likely that TEC could succeed on the merits of its appeal. See Order in Telephone Electronics Corporation v. FCC, No. 95-1015 (D.C. Cir., filed March 15, 1995).

3. Less than two weeks after the issuance of the stay, TEC filed its waiver request; the very next day ^{2/}, the Commission issued its invitation for comments thereon. Noting that it was "expediting" the normal comment period, the Commission required that comments be filed by April 3, 1995 -- a mere three business days following the invitation and less than a week after the filing of the request itself.

4. The Public Notice refers only to TEC's waiver request, and contains no mention of any discussions between TEC and Commission representatives which occurred between March 15 and March 28 relating to possible "settlement" of the TEC appeal. Press understands that such discussions did occur. Indeed, the synchronized, near-instantaneous issuance of the Public Notice a

^{2/} The invitation was issued late in the day on March 29, 1995, as a result of which it was, as a practical matter, not received by many until March 30, 1995.

day after the filing of the waiver request (not to mention the less-than-one-week comment period provided for in the Notice) strongly suggests that this matter was a "done deal" even before TEC filed its request, and that the instant "comment" opportunity is little more than window dressing.

5. While a private settlement may arguably shield the Commission's eligibility criteria from judicial review at least temporarily, and may arguably lead to a lifting of the Court-ordered stay of the auctions, it is not clear to Press that such an approach is in the public interest. Settling with private parties and thereby avoiding final judicial resolution of an appeal which raises (at least in the Court's mind) very serious and valid questions about the lawfulness of Commission-adopted standards seems startlingly short-sighted and inappropriate. This is especially true where the standards are not only arguably unlawful, but also arguably unconstitutional. And even if the auctions were to go forward now, a later judicial determination that they were conducted unlawfully (or unconstitutionally) would add a whole new level of delay and complication which does not need to be there. ^{3/}

^{3/} Press understands that, in ordinary civil litigation between two private parties, settlement is generally regarded as desirable. But where one of the parties is the government, and where the case involves substantial claims that the government agency in question has acted unconstitutionally, settlement is plainly not desirable: since the agency's arguably unconstitutional behavior may, through settlement, escape judicial review, the public would suffer to the extent that potentially unconstitutional conduct by the Commission would, through the Commission's own efforts, be allowed to remain in effect.

6. Press submits that the better approach would be to pursue prompt substantive resolution of TEC's appeal on the expedited schedule which the Court has already established.

7. Press also submits that, before any action can properly be taken on TEC's waiver request, the Commission should disclose all communications which it has had with TEC relative to the possible settlement of TEC's appeal, including (but not necessarily limited to) all communications in which the possibility of granting TEC a "waiver" (or some other equivalent relief, no matter how it might be formally characterized) which might obviate the appeal. If this matter has already been substantively addressed (and possibly resolved) by TEC and the Commission, parties seeking to comment on TEC's waiver request cannot be expected to comment meaningfully on the proposal unless they have access to all relevant discussions which have already occurred.

8. Additionally, if the Commission now intends to consider and act favorably on waiver requests such as TEC's, Press submits that it is completely inappropriate to do so for one requester and one requester only, leaving other potential requesters (such as Press) with no similar access to last minute waiver eligibility for the auctions. Parties such as Press chose not to seek to participate in those auctions initially because of the strict eligibility criteria, criteria which the Commission showed no willingness to waive. If the Commission has now rethought its position vis-à-vis waivers, the waiver mechanism should be made

available to all other potential auction participants.

9. In particular, if (as appears likely from all the available facts and circumstances) the Commission is now willing to waive the auction criteria, the Commission should so announce, and should provide the public with at least some clear indication of the factors which will be considered in connection with possible waivers. The Commission should then provide a reasonable period -- at least 45 to 90 days -- during which such waiver requests may be prepared and submitted. Obviously, pending resolution of all such requests, the auctions should be postponed.

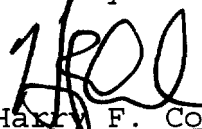
10. Consideration of all possible waiver requests is plainly appropriate here. Inclusion of the broadest possible universe of qualified potential bidders (whatever the applicable waiver criteria) will have the salutary effect of increasing the likelihood of maximum bids for the spectrum which is the subject of the auctions, thus realizing a basic goal of the auction process. By contrast, it is difficult, if not impossible, to perceive any substantial basis for concluding that TEC is the only entity eligible for a waiver. ^{4/}

11. With respect to the far more narrow question of the

^{4/} As far as Press can tell, the only thing which makes TEC even arguably unique in this case is the fact that it was the party which obtained the stay of the auctions. But that certainly does not constitute a valid basis for granting TEC a waiver while denying everyone else any possibility of a similar waiver -- and, indeed, that particular factor is not even advanced by TEC in its request as a basis for favorable consideration nor referenced in the Commission's Public Notice.

particular merits of TEC's particular waiver request, Press has no reason to object to that request, at least to the limited extent that all relevant considerations underlying the request are as set forth in the request itself. As noted above, if other factors or considerations which have been discussed by TEC and the Commission and which may be material to the Commission's disposition of TEC's request were omitted (whether by accident, or by unilateral or mutual design) from the request and/or the Public Notice, Press reserves the right to address such additional factors or considerations once they are disclosed.

Respectfully submitted,


/s/ Harry F. Cole
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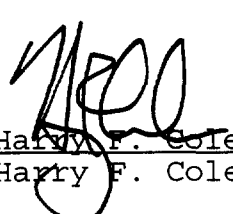
April 3, 1995

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 3rd day of April, 1995, I caused copies of the foregoing "Comments of Press Broadcasting Company, Inc." to be placed in the United States mail, first class postage prepaid, or (as noted below) hand delivered, addressed as follows:

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/s/ Harry F. Cole
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